Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

No. 98-822

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR PUBLIC CITIZEN AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 14, 1999

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

Based on its interpretation of this Court's decision in *Steel Co. v Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), the Fourth Circuit dismissed as moot cross appeals in a Clean Water Act citizen suit awarding civil penalties. The Fourth Circuit also held that petitioners could not be awarded attorney's fees, even though petitioners had caused respondent Laidlaw to halt its continuing violations of the Clean Water Act through successful prosecution of the lawsuit.

Because other *amici* with experience in environmental litigation will discuss the merits in detail, this brief primarily addresses the third question on which certiorari was granted: whether defendant may avoid payment of attorney's fees because the case was dismissed for mootness, even though the litigation was, as a factual matter, responsible for bringing the defendant into compliance with the Clean Water Act.[1] As we discuss below, the Fourth Circuit's rule against "catalyst" fee awards is inconsistent with decisions of this Court defining "prevailing party" status, *see Texas State Teacher's Ass'n v. Garland Indep.*

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[1] Counsel for the parties have consented to the filing of this *amicus curiae* brief, and the letters of consent are being filed with the Court simultaneously with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than Public Citizen and the ACLU has made a monetary contribution to the preparation or submission of this brief.

School Dist., 489 U.S. 782, 792 (1989); *Hewitt v. Helms*, 482 U.S. 755, 761 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Maher v. Gagne*, 448 U.S. 122, 129 (1980), as well as the rule in every other circuit.

Public Citizen is a non-profit, consumer advocacy organization with approximately 150,000 members nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the enforcement of a wide-range of health and safety, environmental, and consumer legislation. Public Citizen has represented plaintiffs in litigation over federal fee-shifting statutes in environmental and other cases. *See Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994); *Chesapeake Bay Found. v. United States Dep't of Agric.*, 11 F.3d 211 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 927 (1994); *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990). In all of these cases, Public Citizen has sought to further the policies behind federal fee-shifting legislation: providing a means for ordinary citizens, who otherwise could not afford counsel, to enforce federal law.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In pursuit of those goals, the ACLU maintains an active litigation program in all fifty states and frequently seeks recovery of court-awarded fees. The ACLU therefore has a direct interest in the outcome of this case and a more general concern that the Fourth Circuit's restrictive interpretation of the fee-shifting statutes will hamper enforcement of the civil rights laws contrary to congressional intent. Since its founding in

1920, the ACLU has appeared before this Court on numerous occasions, both as counsel for parties and as *amicus curiae*.

STATEMENT OF THE CASE

This case involves the successful efforts of three citizen groups to force respondent Laidlaw, the operator of a hazardous waste incinerator, to comply with the limits for discharges of specified pollutants in its National Pollutant Discharge Elimination System ("NPDES") permit. The Clean Water Act prohibits the discharge of any pollutant by any person unless the discharge complies with a permit issued pursuant to one of the permit programs established by the Act. Section 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a), provides for the issuance of NPDES permits for the discharge of wastewater. Each permit includes limits on discharge and requires that the permittee monitor and report its compliance with these limits. *Id.*

Before petitioners filed this suit, Laidlaw had violated its permit hundreds of times, discharging mercury, lead, nickel, arsenic, cadmium, chromium, and zinc into the North Tyger River. *Friends of the Earth, Inc., et al., v. Laidlaw Envtl. Servs.*, 956 F. Supp. 588, 593 (D.S.C. 1997). The cause of the discharge violations was an inadequate wastewater treatment system and Laidlaw's failure adequately to control mercury in its operations. *Friends of the Earth, Inc., et al., v. Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 478 (D.S.C. 1995).

The procedural history of the case is set forth in detail in petitioners' brief. For the purposes of this brief, only the following key facts are relevant.

Laidlaw continually violated its permits for a six-year period preceding, and for many months after, petitioners filed this suit in June 1992. 956 F. Supp. at 613-21. During the six-month period prior to the filing of the suit, Laidlaw violated its mercury limits 103 times, including violations as much as 13 times over its permit limit. 890 F. Supp. at 619-21. After petitioners filed suit Laidlaw took steps to install the proper filters and to control the feed rate of mercury-containing waste into its incinerator to abate its illegal discharges. As a result, the number and severity of its mercury violations dropped sharply, although there were still 13 violations after the complaint was filed. 956 F. Supp. at 621.

After numerous pre-trial proceedings, the district court conducted a three-day trial in July and August 1995 on liability and relief. 956 F. Supp. at 592. In January 1997, the district court entered judgment for plaintiffs, assessing a penalty of $405,800 against Laidlaw payable to the U.S. Treasury, and stating that defendant would be responsible for plaintiffs' attorney's fees and costs. *Id.* at 610-11. The district court concluded that, since Laidlaw had by that time achieved substantial compliance with its permit, there was no need for an injunction, but that Laidlaw's penalties and payment of litigation costs would be sufficient to deter Laidlaw from violating its permit in the future. *Id.*

On appeal, the Fourth Circuit remanded with directions to dismiss the case as moot based on this Court's decision in *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). *See* 149 F.3d 303, 306-07 (1998). The court of appeals held that, because plaintiffs had not appealed the denial of injunctive relief, and the penalty award could not redress any

injury suffered by plaintiffs, plaintiffs no longer had standing. *Id.* Accordingly, the penalty was vacated. *Id.* In addition, the court of appeals held that it could not award plaintiffs their attorney's fees and costs because Fourth Circuit precedent forbids an award of fees under a "catalyst" theory. *Id.* at 307 n.5.

Thus, plaintiffs were successful in forcing Laidlaw to comply with its Clean Water Act permit after years of violations. Nonetheless, because the claim for injunctive relief was moot, Laidlaw avoided payment of all civil penalties. Moreover, even though plaintiffs performed precisely the role Congress intended citizens to serve under the Clean Water Act, plaintiffs were denied all fees and costs incurred over six years of vigorous and successful litigation, including numerous pre-trial motions, a three-day trial, and appeal.

SUMMARY OF ARGUMENT

Amici submit this brief principally to address the question whether attorney's fees may be awarded where plaintiffs achieve post-complaint compliance without a litigated judgment, consent decree, or formal settlement. Nevertheless, *amici* strongly believe that the Fourth Circuit erred on the merits and, for that reason, they briefly address the merits issues in Part I. In our view, this Court's decision in *Steel Company* does not mandate that an environmental citizen suit be dismissed as moot when, because of post-complaint compliance by the defendant, the only available remedy is civil penalties payable to the United States.

In Part II, we turn to the attorney's fees question. The Fourth Circuit's rule that plaintiffs may not recover attorney's fees under federal fee-shifting statutes, unless they litigate to

final judgment or otherwise obtain an enforceable court order, misreads the language of the statutory fee-shifting statutes and misunderstands this Court's "prevailing party" jurisprudence. The critical issue in determining whether a plaintiff is a "prevailing party" is whether there has been a material alteration of the legal relationship between plaintiff and defendant as a result of the suit, not the particular form that such alteration takes (voluntary compliance, settlement, or litigated judgment). Thus, to receive an award of fees under a "catalyst" theory, plaintiffs must demonstrate that, as a result of their lawsuit, they achieved the objectives of the case through settlement, final judgment, or because the defendant "voluntarily" complied with the law.

The Fourth Circuit stands alone in its view that, under *Farrar v. Hobby*, 506 U.S. 103 (1992), a prevailing party must have achieved success by virtue of "a court's authority" and not by any other means. *See S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.)(*en banc*), *cert. denied*, 513 U.S. 876 (1994). Every other federal circuit permits recovery of attorney's fees under a "catalyst" theory.[2]

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[2] This Court need only reach the attorney's fees issue if it affirms the Fourth Circuit on the merits. If the Court reverses the Fourth Circuit on the merits, as *amici* believe it should, it may remand for further proceedings without reaching the attorney's fees issue at this time. Nonetheless, since the attorney's fees issue could be at issue in this suit on remand, and since it is an important issue that affects numerous litigants in civil rights and other statutory fee-shifting cases, it would be appropriate for this Court to reach the attorney's fees question even with a remand on the merits to resolve the split in the

(continued...)

ARGUMENT

I. A CITIZEN SUIT IS NOT MOOT WHERE THE ONLY REMAINING REMEDY IS CIVIL PENALTIES AND WHERE CONTINUING VIOLATIONS ARE ALLEGED AND PROVED.

Unlike in *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), where the plaintiffs did not, and could not, allege continuing violations at the time they filed their complaint, here petitioners not only alleged, but also proved, continuing violations of the limits in respondent Laidlaw's NPDES permit for mercury discharges. Because Laidlaw appeared to be complying with its permit limits by the time the case reached its remedial phase, the district court declined to issue an injunction in the exercise of its equitable discretion. It did, however, impose substantial civil penalties, in part to deter future violations. The district court also stated that plaintiffs would be entitled to recover their attorney's fees and costs. *See* 33 U.S.C. § 1365(d).

On appeal, the Fourth Circuit's concern about the continuing vitality of the lawsuit once the claim for injunctive relief had been denied should have been analyzed under this Court's decision in *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987). Applying *Gwaltney* and the well-settled principles that it reaffirmed, the Fourth Circuit should have placed a "heavy" burden on respondent Laidlaw to demonstrate that there was "no reasonable expectation" that the violations would recur before dismissing

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[2](...continued)
courts of appeals.

the complaint as moot and vacating the civil penalties. *Id.* (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). *See also Steel Co.*, 118 S. Ct. at 1019-20. In fact, no such burden was placed on respondent Laidlaw; for this reason alone the Fourth Circuit's decision should be reversed.

In addition, even though citizen plaintiffs do not have standing to bring an action for penalties where they can neither allege ongoing violations when the complaint is filed nor prove continuing violations at trial, *see Steel Company* and *Gwaltney*, nothing in Article III precludes these plaintiffs from litigating the remedial penalty phase of a case that involved continuing violations at the time of filing, even if there no longer is a claim for an injunction. As explained in greater detail in petitioners' brief and the briefs of the other *amici*, an award of civil penalties and entry of a declaratory judgment redress injuries suffered by these citizen plaintiffs through deterrence of future violations in those cases where plaintiffs have proved post-complaint violations. *See Tull v. United States*, 481 U.S. 412, 422 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see also Hudson v. United States*, 118 S. Ct. 488, 494 (1997) ("all civil penalties have some deterrent effect").

Thus, in cases in which citizen plaintiffs have alleged (and proved) continuing violations of the defendant's NPDES permit, the interest of those plaintiffs in an award of civil penalties as a deterrent to future violations is enough of an interest to sustain Article III standing through the remedial phase. Otherwise, Congress's intent that citizen suit plaintiffs may recover both civil penalties and injunctive relief will be frustrated. *See* 33 U.S.C. §§ 1319(d), 1365(a). Moreover, even if a citizen plaintiff's interest in an award of civil penalties is a minimal one, which *amici* believe it is not, a minimal interest in deterring future violations through civil penalties is as significant

as the interest in a nominal damages award which this Court has recognized can keep a case alive where an injunctive relief claim is moot. *See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 442 (1983) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot"); *see also University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981).

By comparison, the contrary rule endorsed by the Fourth Circuit would create perverse incentives. If mooting injunctive relief eliminates all relief, plaintiffs will be forced to argue that an injunction is needed and the courts will be required to decide difficult claims for injunctive relief where the real dispute is over an award of civil penalties. Indeed, the United States will be forced to intervene to protect its right to the civil penalties. Defendants, on the other hand, will seek to delay determinations on the merits until they comply and thereby avoid all penalties no matter how significant the violations. *See Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg., Inc.*, 2 F.3d 493, 503-04 (3d Cir. 1993). On the merits, therefore, *amici* respectfully urge the Court to reverse and adopt the views of five federal circuits that post-complaint compliance does not moot a claim for civil penalties under the Clean Water Act.[3]

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[3] *See Comfort Lake Ass'n, Inc., v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Found., Inc., v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir.), *cert. denied*, 118 S. Ct. 442 (1997); *Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg,. Inc.*, 2 F.3d 493, 502-03 (3d Cir. 1993); *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020-21 (2d Cir. 1993); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*,

(continued...)

II. PLAINTIFFS MAY BE "PREVAILING PARTIES" EVEN IF POST-COMPLAINT CESSATION OF ILLEGAL CONDUCT MOOTS THE LITIGATION.

Over 100 federal fee shifting statutes predicate an award of fees on some degree of success by the plaintiffs. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (appendix listing federal statutes authorizing award of attorney's fees); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (Clean Air Act). The fee provision of the Clean Water Act, like many fee-shifting statutes, requires that plaintiffs demonstrate that they are "prevailing" or "substantially prevailing" parties. *See* 42 U.S.C. § 1365(d). The court may award such fees and costs "in issuing any final order." *Id.*

The rationale underlying all of these "citizen suit" and "private attorney general" statutes is essentially the same -- to enable those who have been wronged to seek redress and to encourage the vindication of federal policy by private parties. *See Evans v. Jeff D.*, 475 U.S. 717, 741 (1986) (Section 1988 gives "victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts and therefore to vindicate their rights."); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (Title II of 1964 Civil Rights Act). The purpose of the citizen suit provision under the Clean Water Act is to abate violations of the law by both deterring future harm and punishing past, illegal conduct. *See Gwaltney*, 484 U.S. at 61; *see also Pennsylvania, et al., v. Delaware Valley Citizens Council for Clean Air, et al.*,

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[3](...continued)
897 F.2d 1128, 1135-36 (11th Cir. 1990).

478 U.S. 546, 559 (1986). Without the possibility of a fee award after a successful suit, citizens seeking to enforce these statutes will all too often have a difficult time retaining counsel. As a result, these rights will exist in name only -- out of reach to ordinary citizens. *See* H.R. Rep. No. 1558, 94th Cong. 2d Sess. 1-3 (1976) (report accompanying enactment of Section 1988).

Alone among the courts of appeals,[4] the Fourth Circuit interprets the "prevailing party" language and this Court's jurisprudence to preclude recovery under the well-established "catalyst" theory. That catalyst theory recognizes that a party may achieve the objectives of litigation by causing a change in the defendant's behavior even without an enforceable judgment on the merits. The Fourth Circuit's contrary rule, rejecting the catalyst theory, was first announced in *S-1 and S-2*, 21 F.3d at

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[4] *See Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357-58 (8th Cir. 1998); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997); *Marbley v. Bane*, 57 F.3d 224, 233-35 (2d Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010-11 (9th Cir. 1995); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Beard v. Tedska*, 31 F.3d 942, 950-52 (10th Cir. 1994); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-50 (3d Cir. 1994); *American Council for the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 250-51 (10th Cir.), *cert. denied*, 510 U.S. 864 (1993); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993); *Paris v. United States Dep't of Housing and Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-58 (6th Cir. 1993); *Pembroke v. Wood County, Texas*, 981 F.2d 225, 231 n.27 (5th Cir.), *cert. denied*, 508 U.S. 973 (1993).

51 (interpreting the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 ("section 1988")). Later that same year, the "no catalyst" rule was applied to preclude fees in two other section 1988 cases, *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994), and *Arvinger v. Mayor and City Council of Baltimore*, 31 F.3d 196, 202-03 (4th Cir. 1994). Two years later it was applied to a Voting Rights Act case. *See Statewide Reapportionment Advisory Cmte. v. Beasley*, 99 F.3d 134, 136-37 (4th Cir. 1996). Most recently, it was applied to this case arising under the Clean Water Act. Both in theory and in practice, therefore, the Fourth Circuit's rule dramatically narrows the grounds for fee awards to plaintiffs seeking to vindicate federal civil rights or enforce federal environmental or consumer statutes.

This Court has repeatedly endorsed the catalyst theory of attorney's fee awards, recognizing that a final judgment on the merits is not a necessary prerequisite to achieving "prevailing party" status. For instance, in *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court acknowledged a catalyst theory under Section 1988. "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under section 1988." *Id.* at 761. As if to reject the very theory later adopted by the Fourth Circuit, the Court further noted that "[a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment -- *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor." *Id.* at 760-61. After all, what one seeks in a lawsuit is not a judicial pronouncement for its own sake but to change the behavior of the defendant in some way. *Id.* Thus, "if a defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed."

Id.

Similarly, in *Maher v. Gagne*, 448 U.S. 122 (1980), the Court stated that "[n]othing in the language of section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129. Rejecting the argument that a settlement -- without a judgment on the merits -- cannot provide "prevailing party" status under section 1988," *Maher* quoted a passage of the Senate Report accompanying the enactment of section 1988. *See id.* "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.") (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976)); *see also Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1979) (per curiam) (recognizing that a person may "in some circumstances be a 'prevailing party' " if his rights are vindicated "without formally obtaining relief"); *cf. Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (prevailing party is one who "succeeds on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit").

The House Report accompanying Section 1988 explicitly endorses treating cases in which a defendant's "voluntary compliance" affords plaintiffs the requested remedy no differently than cases in which the plaintiffs obtain relief through a favorable judgment on the merits, a settlement, or a consent decree.

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits . . . . If the litigation is terminated by consent decree, for

> example, it would be proper to award counsel fees [citations omitted]. A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

H.R. Rep. No 1558, 94th Cong., 2d Sess. 7 (1976). The legislative materials accompanying the 1987 amendments to the Clean Water Act similarly support the view that a "prevailing party" is one who settles the case as surely as one who litigates to judgment. *See* S. Rep. No. 50, 99th Cong., 1st Sess 33 (1985) ("The Committee recognizes that a party may 'prevail' by achieving a successful settlement."); *see also* S. Rep. No. 233, 98th Cong., 1st Ses 24-25 (1983).

In the Fourth Circuit's view, however, this Court's endorsement of the catalyst theory over the course of a decade was overruled *sub silentio* by this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). No other circuit has adopted that interpretation of *Farrar* and for very good reason: The Court in *Farrar* did not consider or rule on the validity of the catalyst theory. Rather, the issue in *Farrar* was whether a fee award of $280,000 was reasonable, assuming the plaintiff had technically prevailed through an award of $1 in a suit seeking $17 million. In the course of a general discussion on fee awards under Section 1988, the Court stated that, to be a prevailing party, a "plaintiff must obtain at least some relief on the merits of his claim," an "enforceable judgment against the defendant," or "comparable relief through a consent decree or settlement." *Id.* at 111. Citing to the test articulated in *Texas State Teachers*

Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989), the Court explained that a "plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111.

The Fourth Circuit incorrectly construed the comments in *Farrar* about obtaining relief through an enforceable judgment, consent decree, or settlement as an exhaustive list, foreclosing the possibility of a fee award where the plaintiff achieves relief through "voluntary" compliance by the defendant. Writing for a one-vote *en banc* majority in *S-1 and S-2*, the court held that a "prevailing party" must achieve success by virtue of "a court's authority," and not by any other means. 21 F.3d at 51. Nothing in *Farrar*'s holding suggests that prevailing party status may not be achieved in other ways. In fact, the context makes clear that the list in *Farrar* is not exclusive and that the core inquiry remains the one articulated in *Texas State Teachers, Maher, Hewitt,* and *Hensley* -- alteration of the relationship between a plaintiff and a defendant in a way that benefits the plaintiff. 506 U.S. at 111. As the Third Circuit has noted, "it is not likely that the Supreme Court would overturn such a widespread theory without even once mentioning it, particularly when it was inapplicable to the case at hand." *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *accord Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994).

The language in *Texas State Teachers* and *Farrar* that a prevailing party must demonstrate a "material alteration of the legal relationship" was meant to clarify that mere technical victories might be too insignificant to meet the prevailing party threshold. *See* 489 U.S. at 792-93. Once the defendant's behavior has changed to moot the factual basis of the complaint,

the legal relationship has likewise been altered because the defendant can no longer be said to be in violation of legal rights held by the plaintiff. This language cannot be fairly read to require, contrary to the explicit views of the Court in *Maher* and *Hewitt*, that there be an enforceable judgment before a litigant may be a "prevailing party."

To the contrary, *Texas State Teachers* and *Farrar* reaffirmed the by then well-established jurisprudence that the threshold test for prevailing party status is whether the plaintiff "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar*, 506 U.S. at 109 (citing *Hensley*, 461 U.S. at 433); *Texas State Teachers*, 489 U.S. at 789 (citing *Hensley*, 461 U.S. at 433). As Justice O'Connor's concurrence in *Farrar* made clear, the inquiry remains one of causation: whether the plaintiffs succeeded, through the vehicle of the lawsuit, in achieving at least some of the practical relief that they sought by changing the "behavior of the defendant towards the plaintiffs." *See Farrar*, 506 U.S. at 116 (O'Connor, J. *concurring*) (citing *Hewitt*, 482 U.S. at 761). Once the conditions of causation and substantial benefit to the plaintiff are satisfied, there is no need for the additional requirement that the change in conduct or law be judicially mandated or formalized by judicial decree. *See, e.g., Marbley v. Bane*, 57 F.3d at 234; *Baumgartner*, 21 F.3d at 547; *see also Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978).

In some cases, like *Texas State Teachers* and *Farrar*, success in the litigation will take the form of a judgment in plaintiffs' favor. *See also Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (party who wins a declaratory judgment prevails if judgment affects "behavior of the defendant toward the plaintiff"). But even if there is no such legal judgment to

enforce, a change in defendant's behavior that has the practical effect of redressing plaintiff's alleged injuries, and the legal effect of mooting out their complaint, means that plaintiffs have "prevailed" as surely as obtaining a declaratory judgment or securing nominal relief. *See Maher*, 448 U.S. at 129. In this case, the alteration in defendant's conduct actually conferred a greater benefit on plaintiffs who otherwise could not catch or eat fish from the North Tyger River because of mercury contamination, than in a case like *Farrar* where plaintiff obtained only nominal relief that, nonetheless, was embodied in a court judgment. In sum, the decision in *Farrar* does not foreclose a catalyst theory of fee recovery and the Fourth Circuit erred in so holding contrary to the language, history, and purpose of the fee-shifting statutes. [5]

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[5] The court of appeals acknowledged that its decision on fees was inconsistent with the decision in *Gwaltney*. *See* 149 F.3d at 307 n.5. Nonetheless, in addition to its reliance on *Farrar*, the court of appeals suggested that the 1987 amendment to the Clean Water Act adding the "prevailing party" language, accounted for the difference. The pre-amendment language had provided that fees might be awarded "whenever the court determines such award is appropriate." *Gwaltney*, 484 U.S. at 67 n.6. Congress amended this language solely to eliminate confusion over whether fee awards could be made to plaintiffs who had not prevailed at all, *see Ruckelshaus*, 463 U.S. at 682, and to clarify that at least some degree of success in the litigation must be achieved, as had been the standard in civil rights case under 42 U.S.C. § 1988. *See A Legislative History of the Water Quality Act of 1987*, 100th Cong., 2d Sess. Sen. Print 144 (Nov. 1988), vol. 2, pp. 1311-1312.

Indeed, a case such as this one, in which relief on the merits has arguably become moot because of post-complaint compliance by the defendant, provides the classic situation in which an award under a catalyst theory is appropriate. *See Zinn by Blankenship*, 35 F.3d at 274 ("a plaintiff may be a prevailing party for purposes of section 1988 even if the defendant voluntarily provides the relief sought rather than litigating the suit to judgment"); *Little Rock School Dist.v. Pulaski County Special School Dist. #1*, 17 F.3d 260, 262 (8th Cir. 1994) ("[w]here a defendant voluntarily complies with a plaintiff's requested relief, thereby rendering the plaintiff's lawsuit moot, the plaintiff is a 'prevailing party' under section 1988 if his suit is a catalyst for the defendant's voluntary compliance and the defendant's compliance was not gratuitous"); *Jean v. Nelson*, 863 F.2d 759, 766 (11th Cir.), *aff'd*, 496 U.S. 154 (1988) ("mooting of a lawsuit by a defendant's favorable remedial action does not necessarily deprive a plaintiff of 'prevailing party' status"); *see also Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993). Otherwise, "if defendants could deprive plaintiffs of attorneys' fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing ... these civil rights suits, a result inconsistent with Congress's intent in enacting section 1988." *Baumgartner*, 21 F.3d at 548; *accord Zinn*, 35 F.3d at 274-76.

Under the Fourth Circuit's prohibition on catalyst fee awards, however, plaintiffs are deprived of any award of attorney's fees despite their success in vindicating federal rights. If the Fourth Circuit's rule precluding catalyst fee awards is allowed to stand, it will virtually assure that fewer citizen suits -- under both the civil rights statutes and the environmental statutes -- will be brought. Combined with the Fourth Circuit's holding on the merits that a defendant may avoid an assessment

of civil penalties by dragging out the case until it brings itself into compliance, and the enormous expense involved in litigating these cases to a successful resolution, citizen groups will not be able to find attorneys with the financial resources to bring these cases. Such a result is contrary to Congress's intent to provide a means for ordinary citizens harmed by violations of federal civil rights, environmental, and other statutes to serve as adjuncts to law enforcement by state and federal officials.

CONCLUSION

For the reasons given, this Court should reverse and remand the Fourth Circuit's decision on the merits. In that case, this Court need not reach the attorney's fees issue. However, if this Court affirms on the merits, the attorney's fees issue will be squarely presented and this Court should reverse the Fourth Circuit's "no catalyst" rule. In any event, *amici* believe that this Court may reach the attorney's fees issue, to give guidance both in this case on remand and to the lower courts more generally.

Respectfully submitted,

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May 14, 1999